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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 835

ROBERT VASQUEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner, Robert Vasquez, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on February 2, 1956.

Citation of Opinion Below

The District Court did not write or file an opinion. The opinion of the Court of Appeals, printed in Appendix "B" hereto, infra p. 23, is reported in 229 F. (2) 288.

Jurisdiction

The judgment of the Court of Appeals was entered on February 2, 1956. (R. 166; opinion, R. 163; p. 23, infra.) A timely petition for rehearing filed on February 17, 1956 (R. 167) was denied on March 13, 1956. (R. 178.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), and Supreme Court Rule 22 (2).

Questions Presented

1. Whether under an indictment for a violation of 26 U. S. C., Sec. 2591 (a) (1954 I. R. C., Sec. 4742), printed Appendix "A", p. 21, infra, the failure to allege the act was "wilfully and knowingly" done, or some equivalent thereof, may be raised for the first time by motion in arrest of judgment?

And incidental to this question, the question arises as to whether "scienter" is an essential element of the offense prohibited by 26 U. S. C., Sec. 2591 (a), and whether failure to allege the act was "wilfully and knowingly" done constitutes a substantial defect in the indictment.

2. Whether under Federal Rules of Criminal Procedure, Rule 52 (b), 18 U. S. C., 548 where no exception to the court's charge was taken in the trial court, the Court of Appeals may note plain error in the trial court's charge affecting substanial rights of defendant, or whether the rule of plain error, is so limited by Rule 30, 18 U. S. C., 309, when the error in the charge is not objected to, as to prevent consideration thereof by the Appellate Court?

Incidental to this question, the question arises as to whether, under the evidence bearing on entrapment in this case, the charge of the court limiting the defense of entrapment to acts of fraud and trickery on the part of the representatives of the government was so plainly erroneous as to affect the substantial rights of the defendant? The correctness of the jury's verdict on entrapment is not involved.

3. Whether the conviction of the defendant by the jury upon two separate counts, both as a "transferor" and a "transferee" respectively, based upon the same identical acts alleged and proven to have occurred at one and the same time, makes the verdict so inconsistent that neither conviction may stand?

Statutes Involved

The statutory provisions involved are: 26 U. S. C. Secs. 2591 (a) and 2593 (a), found in the 1954 Internal Revenue Code as, Sections 4742 and 4744 respectively.

Also involved is the proper construction of Federal Rules of Criminal Procedure, Rules 30 and 52 (b).

The petition involves a comparison and analogy with and between the above marihuana statutes and the Harrison Act, 26 U. S. C., Secs. 2553 (a) and 2554 (a), (1954 I. R. C., Secs. 4704 and 4705).

All the above statutes and rules are printed in Appendix "A", p. 19-22, infra.

Statement

Petitioner (defendant in the District Court) was indicted in two counts, as follows:

Under Section 2591 (a), U .S. C. (1954 I. R. C. Section 4742), the first count;

"On or about April 29, 1954, in Travis County, Texas, within the Western District of Texas, Austin Division, Robert Vasquez transferred two ounces of marihuana to William R. Hicks, which transfer was not in pursuance of a written order of the said William R. Hicks on a form issued in blank for that purpose by the Secretary of the Treasury." (R. 3.)

The defendant did not move to dimiss this indictment, but, on the day after the judgment, filed a motion in arrest of judgment upon the following ground:

"The First Count of the indictment is void and fatally defective, because it is not alleged in said count that the defendant willfully, knowingly, and illegally transferred the two ounces of marihuana complained of to William R. Hicks, and it is not alleged that he knew the substance transferred was marihuana, and that he knew that it was transferred not in pursuance of a written order of the said William R. Hicks on the required form, and that in none of the elements of the offense is the essential element of scienter alleged in connection with said indictment, and knowledge and scienter is an essential element of the offenses sought to be charged." (R. 143.)

This motion in arrest was overruled (R. 147), and the conviction on this count was affirmed. (R. 166.)

Under Section 2593 (a), 26 U. S. C., the second count read as follows;

"At the time and place, and within the jurisdiction, all as described in the first count hereof, Robert Vasquez acquired two ounces of marhuana without having paid the transfer tax imposed thereon by law, and the said Robert Vasquez was then a transferee required by law to pay the same." (R., p. 3.)

The defendant was convicted on this count in the District Court, as well as the first count. (R. 136.)

Defendant moved in arrest of judgment as to both counts 1 and 2, on the following ground;

"The verdict of the jury finding the defendant guilty of both Count One and Count Two, and the judgment of the Court, adjudging the defendant guilty and sentencing him on both Count One and Count Two, on the face of the record, are fundamentally erroneous, void, and illegal, because it appears from the record and from the evidence in this case, but irrespective of the evidence and on the record alone, the jury convicted the defendant of being both the transferor in Count One and the transferee in Count Two in connection with the same and identical transaction on or about April 29, 1954, in Travis County, Texas, and within the Western District of Texas, Austin Division, and in connection with the identical two ounces of marihuana, and that the defendant could not have been both transferor and transferee in connection with the same transaction, and it cannot be ascertained or made to appear from the verdict of the jury finding the defen-

dant guilty on both counts of the indictment, whether or not the jury found the defendant to be a transferor or a transferee, in connection with the identical transaction and the identical two ounces of marihuana, and because in order for the jury to have rendered a valid verdict in this case, and in order for the Court to have rendered a valid judgment in this case, it was necessary that the Government at the close of the testimony elect from the evidence as to whether or not it contended that in connection with the transaction complained of and proved in this case that it contended that the defendant was a transferor or a transferee, and to elect upon which count to go to the jury." (R. 142-143.)

This motion was overruled (R. 147); but the Court of Appeals reversed this conviction on the second count, and entered a judgment of acquital on this count. (R. 166.)

The District Court charged the jury, in part, on the issue of entrapment, as follows:

"If you are satisfied *that prior to the commission of the acts alleged to constitute the crime, that the defendant never conceived any intention of committing these offenses or similar offenses*, but that the officers of the government incited and by persuasion and representations lured him to commit the offense alleged in order to entrap, arrest and prosecute him therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of not guilty." (R. 117-118, Italics ours.)

As stated by the Court of Appeals in its opinion (R. 164) there was no exception to the charge. The defendant did file a motion for acquital on the grounds on entrapment, and the motion specifically

pointed out to the District Court all the essential elements of entrapment which should have been included in the court's charge, if the court submitted the case (as it did) to the jury. (R. 130-131.) This motion was overruled. (R. 131.)

Sufficient evidence is setout in Exhibit "C" of this petition to show that the issues of entrapment were raised, and that ~~never~~ There was evidence both as to entrapment by "deceit" and "inducement." (This Petition, pp. 26-30.) This court is not asked to decide the question of fact.

This Court of Appeals refused to consider the plain and substantial error in the District Court's charge on entrapment, because "there was no exception to its charge" (R. 164); evidently relying upon the proposition that Rule 30 prevented the application of the "plain error" Rule 52 (a).

The Court of Appeals ignored the points as to the inconsistent verdict of quilty on both counts of the indictment (R. 163-165), convicting defendant as both a "transferor" and "transferee" with reference to the identical transactions.

The Court of Appeals refused to hold the indictment bad, because the question was first raised in arrest of judgment, relying upon the authority of *U. S. v. Williams*, (5th Cir.) 202 F. (2) 712, rehearing denied (5th Cir.) 203 F. (2) 572, at page 573; and court below also cited *Sutton v. U. S.*, (5th Cir.) 157 F. (2) 661. Petitioner conceives that the *Williams* case does not support the opinion in our *Vasquez* case; and that the majority holding in the *Sutton* case is contrary to the decision in our case.

Reasons for Granting the Writ

1. The decision of the court below in the instant case, is directly in conflict, on the question of "knowledge" and "scienter", and in holding that the defect in the indictment may not be raised in arrest of judgment, with the decision of the Supreme Court in *U. S. v. Carll*, 105 U. S. 611.

Petitioner does not suggest that the same statutory offense is involved in the two decisions. *Carll* rose under the "uttering of a forged instrument" statute, *Revised Statutes 5431* (18 U. S. C., Sec. 472), and the decision in the instant case arose under 26 U. S. C., Sec. 2591 (a), (1954 I. R. C., Sec. 4742).

The cases are directly in conflict on the questions of law involved.

Revised Statutes, Sec. 5431, in defining the "offense of uttering a forged security of the United States government", did not include "scienter" in the definition, nor use the words "wilfully" or "knowingly." (See Exhibit "A", this Petition, p. 22.) The question before the Supreme Court, as copied from the Statement of Judge Gray, was:

"Whether the indictment setting forth the offense in the language of the statute, without further alleging that defendants knew the instruments to be false, forged, counterfeited and altered, was sufficient, after verdict, to warrant judgment thereon." (105 U. S. 611.) Defendant in that case, being convicted by the jury, "*moved in arrest of judgment for the insufficiency of the indictment.*" (Quoted from *Carll*, p. 611, Italics ours.)

26 U. S. C., 2591 (a) making the transferor of marihuana guilty of an offense does not include "scienter" in the definition of the offense, "nor use the words "wilfully" or "knowingly" (See Exhibit "A", this Petition, p. 21); but "knowledge" that the substance transferred was marihuana is essential to make out the crime. *U. S. v. Balint*, 258 U. S. 250;*Nigro v. U. S.*, (8th Cir.) 4 F. (2) 781, distinguishing *U. S. v. Balint; Rent v. U. S.*, (5th Cir.) 209 F. (2) 893; and *U. S. v. Maghinang*, (D. C. D. Del.) 111 F. Supp. 760.

The Court of Appeals in the instant case said: "The appellant did not file a motion to dismiss or ask for bill of particulars prior to the trial; after verdict he moved in arrest of judgment. Therefore, we conclude that the offenses charged in this indictment were sufficiently described to enable the appellant to prepare his defense on the trial below, and to plead former jeopardy successfully if brought to trial again for the same offense." (R. 164, Exhibit "B", this Petition, p. 23.)

Contrary to this holding is the opinion in *Carll*, as follows:

"In this case, as in that (case cited by the Court), knowledge that the instrument was forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

"This indictment, by omitting the allegation contained in *US. v. Howell*, 11 Wall. 423 (78 U. S. 195), and in all approved precedents, that defendant

knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only', within the meaning of Section 1025 of the Revised Statutes." (105 U. S. 613.)

The right to present a substantial defect in an indictment, which because of the failure to allege "knowledge" is insufficient to state an offense, by motion in arrest of judgment is universally recognized. See: *United States v. Cruikshanks*, 92 U. S. 542, *l. c.* 548, where the question of the defect in the indictment "arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts." No case more clearly and correctly states the rule than the opinion of Judge Holmes (of the 5th Circuit), himself, in the case cited in the opinion in this case, *Sutton v. U. S.*, (5th Cir.) 157 F. (2) 661. The correct application of the decision in the *Sutton Case*, petitioner conceives, would require a reversal of the instant case. Judge Holmes has permitted himself to be led into error by the *Williams Case*, (5th Cir.) 202 F. (2) 712. That case is not in point because on the first count in the *Williams* Case involving the question of "knowledge", there was a verdict of "not guilty". The counts upon which conviction was had sufficiently alleged "knowledge."

The Court of Appeals in the *Williams Case* states that the failure to allege "scienter" or fraud may be waived by the accused under Rule 12 (b), (2) and (3), 18 U. S. C., 205. The same holding was made in this instant case as appears in the opinion of

the Court of Appeals. (Appendix "B", this brief, p. 24.)

An indictment failing to charge "knowledge" where "knowledge" is an essential element of the offense, does not charge a crime, and Rule 12 (b) by its own terms has no application, because in absence of "scienter", the indictment did not allege an offense. The Court of Appeals was in error in that dicta in the *Williams Case*. In *Carll* the Supreme Court in construing *Revised Statutes* 1025, substantially like parts of Rule 12 (b), held that where "knowledge" is an element of the offense, an indictment not charging the act was "knowingly" done does not charge an offense.

The Supreme Court in *U. S. v. Balint*, 258 U. S. 250, states the general rule as to necessity of alleging "knowledge", but holds that under Section 2, of the *Harrison Act*, 26 U. S. C., Sec. 2554 (a), 1954 I. R. C., 4705, "scienter" is not an essential element of the offense, but that Congress intended to make a person trafficking in narcotics do so at his peril.

The Court of Appeals for the 8th Circuit in *Nigro v. U. S.*, 4 F. (2) 781, distinguished *Balint*, and held that under Section 1 of the *Harrison Act*, 26 U. S. C. 2553 (a), 1954 I. R. C., 4704, prohibiting possession of narcotics in an unstamped package, "scienter" is an essential element of the offense.

It is not thought that the Court of Appeals intended to hold that the rule of *Balint* applies so as to make a person, not trafficking in marihuana, who merely transfers a substance, in fact marihuana, guilty of a crime, if he did not know what the substance was.

Section 2 of the *Harrison Act* dealt with persons engaged in selling, bartering, exchanging, or giving away narcotics. But Section 2591 (a) punishes any person who transfers possession of marihuana, only if he knows what it is.

2. The decision in the Court below in the instant case is directly in conflict with the decision of the Second Circuit in *U. S. v. Sherman*, 200 F. (2) 880, both the instant case and that Second Circuit case construing Fed. Rules Crim. Proc., Rule 52 (b), 18 U. S. C., 548.

In the *Sherman Case*, a charge, in substance the same as given in the instant case (See Statement, this Petition, p. 6), was held to be erroneous and *"grave enough to be noticed, although the defense had not excepted to it."* (200 F. (2) 883; Italics ours.) The objectional charge in the *Sherman Case* was as follows:

"The law says you can't trick anyone into it by artifice or fraud such as giving a fabulous offer, or telling somebody that you are in excruciating pain and you must have it; or some such inducement that would put the idea into somebody's head where it never existed before."

Here, as in our instant case, the trial court made the defense of entrapment turn on trickery and deceit, and not inducement; the charge in our case making entrapment depend upon lack of intent to commit an offense.

In holding this charge erroneous, the court, in the *Sherman Case*, says:

"So far as concerns the defense, i.e., the inducement, it was complete without 'trickery' or fraud; it

includes soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged. If the prosecution sees fit to set the accused in motion, it is called upon to make good its excuse."

The instant case is directly in conflict with the *Sherman Case*. The exact error in the charge as contained in the *Sherman Case* was pointed out by Petitioner in his Brief in the Court of Appeals by the Ninth and Tenth Propositions (p. 62, Appellant's Brief in the Court of Appeals, printed in Appendix "C", this Petition, p. 30).

The opinion in this instant case says:

"In response to a question by the court, the defendant's attorney told the court that there was no exception to its charge." (R. 164; this Petition, Exhibit "B", p. 23.)

The Court of Appeals for the Ninth Circuit in *Bloch v. United States*, 221 F. (2) 786, reyling upon the opinion of the Supreme Court in *U. S. v. Atkinson*, 297 U. S. 157, applied Rule 52 (b) with reference to a charge on wilfulness in the same manner as the decision in the *Sherman* Case. The Supreme Court in *Atkinson* holds that the rule is especially applicable in criminal cases.

The *Bloch Case* has been overruled, by the same Court of Appeals which decided the case, in *Herzog v. U. S.*, 226 F. (2) 561, *l. c.* 567, which case approves *Brown v. U. S.*, (9th Cir.) 222 F. (2) 293, 298, by the same court. The *Herzog* and *Brown* cases hold that F. R. C. P., Rule 30, prevents the application of the "plain error rule" of Rule 52 (b) being applied to plain and substantial errors in a trial court's charge.

The instant case, as well as the *Herzog* and *Brown* cases are in direct conffict with the *Sherman Case* from the Second Circuit; and, in fact, *Herzog* and *Brown* from the 9th Circuit are contrary to that Court's own opinion in the *Block Case.*

The instant case and *Herzog* and *Brown* case are contrary in principle to the opinions of the Supreme Court in *U. S. v. Atkinson, supra; Screws v. U. S.* 325 U. S. 91, 107; *United Brotherhood of Carpenters and Joiners v. U. S.*, 330 U. S. 395, 411, 412; and *Wiborg v. U. S.*, 163 U. S. 632.

These decisions are also contrary in principle to *U. S. v. Pincourt*, 159 F. (2) 917, from the Third Circuit and *U. S. v. Rappy*, 157 F. (2) 964, certiorari refused, 329 U. S. 833, from the Second Circuit.

The conflict in the decisions between the various Courts of Appeals, in the reconciliation of Rule 30 and Rule 52 (a), is pointed out by the Court of Appeals in the *Herzog case*, and is discussed at length, but the Court comes to the conclusion that: "Rule 30 is clear and unambiguous and its application is not dependent upon the personal whims of the court. It provides no portion of the charge of the jury or omission therefrom may be assigned as error unless objection is made before the jury returns. This rule which has force of law leaves no area in which it may be disregarded." *Herzog* (9th Cir.) 226 F. (2) 569.

The holding is the same as the holding in our instant case, and conflicts with many cases, and petitioner submits the holding is erroneous. The

conflict in the decisions was expressly recognized in the concurring opinion in the *Herzog case.*

3. Clearly, the questions presented involving the rights to present substantial defects in a motion in arrest of judgment, and the right of the appellant court under Rule 52 (a) to notice plain and substantial error in the trial court's charge is of importance to the administration of the criminal law and jurisprudence of the United States, in protection of the rights of persons accused of crime and the public in criminal cases.

All criminal trials are affected by the determination of these questions. Settlement of this question should be made by the Supreme Court. Rules 30 and 52 (a) were promulgated by the Supreme Court. The Court of Appeals has said that the Supreme Court by Rule 30 intended to deny to appellate courts the right to notice plain and substantial error in a trial courts charge under Rule 52 (a), in absence of a timely objection in the trial court. Only the Supreme Court can determine these questions and the meaning of these rules authoritatively.

4. The decision of the court below was decided erroneously upon an important issue involving the administration of criminal justice in the federal courts, arising out of the inconsistent verdict of the jury in finding defendant guilty in the two counts, in one as a "transferor" and in the other as a "transferee", growing out of the same and identical transaction.

Where the first count in our indictment alleged a certain time and place, and the second count alleged the same time and place by reference to the first

count, the two counts refer to the same transaction. See: *Rosenthal v. U. S.*, (9th Cir.) 276 F. 714.

A person may not be both a "transferor" and "transferee" in regard to the same and identical transaction. See *Lott v. U. S.*, 123 C. C. A. 336, 205 F. 28; *U. S. v. Farrar*, 38 F. (2) 515, affirmed, 281 U. S. 624.

More squarely in point are *Adams v. United States*, (5th Cir.) 220 F. (2) 297; *United States v. Moses*, (3rd Cir.) 220 F. (2) 166 ;*United States v. Sawyer*, (3rd Cir.) 210 F. (2) 169, all of which cases held that the identity of the defendants as agents of the purchasers of narcotics excluded the possibility that they may have been agents of the sellers in respect to the same transaction.

If a person may not be agent for both the seller and the purchaser in the same transaction, then a verdict so finding is fatally defective. See: *80 A. L. R. 171*, on *Necessity of consistency in Verdicts in Criminal Cases.*

Leading decisions from the several states in point are: *Crawford v. State*, 31 Tex. Cr. 51, 19 S. W. 766; *Bargesser v. State*, 95 Fla. 404, 116 So. 12; *Commonwealth v. Haskins*, 128 Mass. 60; *re Franklin*, 77 Mich. 615, 43 N. W. 997.

It is not improper to permit both counts to go to the jury, to be determined from the evidence. But the jury should be charged that it could not convict defendant upon both counts. Defendant need not request such a charge, because conviction on both counts is void. See: *Jackson v. State*, 131 Tex. Cr. 287, 98 S. W. (2) 193.

The appellate court may not substitute its judgment for the verdict of the jury, and say "the jury intended to convict on the First Count alone, and we will reverse the second count for insufficient evidence", as was done in the instant case.

The Supreme Court should grant the petition in this case and establish the practice in criminal cases in the Federal Courts where a defendant is charged in the same indictment with inconsistent offenses.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Appendix "A"

RULES AND STATUTES CITED.

FEDERAL RULES OF CRIMINAL PROCEDURE (Material Portions)

Rule 12 (b) (2) and (3).

"2. *Defenses and objections which must be raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

"3. *Time of making motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter."

Rule 30.

"30. *Instructions.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that thet court instruct the jury on the law as set forth in the requests. At the same time copies of

such requests shal be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52 *Harmless Error and Plain Error.*

"(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATUTES

26 U. S. C., Sec. 2553 (a), (1954 I. R. C., Sec. 4704.)

"(a) *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession the same may be found."

26 U. S. C., Sec. 2554 (a), (1954 I. R. C., Sec. 4705.)

"(a) *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away

narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

26 U. S. C., Sec. 2591 (a), (1954) I. R. C., Sec. 4742.)

"(a) *General requirement.*—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

26 U. S. C., Sec. 2593 (a), (1954 I. R. C., Sec. 4744.)

"(a) *Persons in general.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4741 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 4741 (a).

Note of explanation: The numbers of the articles referred to by reference in the foregoing statutes are

the numbers of the Internal Revenue Code of 1954.

Revised Statutes (Compiled 1901), Section 1025.
"*Indictments; defects of form.*

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Revised statutes (Compiled 1901), Section 5431.
"*Passing, selling, concealing, etc., forged obligations.*

"Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States with the intent to pass, publish, utter, or sell, or keeps in possession or conceals with like intent any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than fifteen years."

Appendix "B"

(Opinion of Court of Appeals)

(February 2, 1956)

Before HOLMES, RIVES, and CAMERON, Circuit Judges.

HOLMES, Circuit Judge: The appellant was indicted in each of two counts of an indictment, filed January 25, 1955; in the first count he was charged with having, in Travis County, Texas, on or about April 29, 1954, transferred two ounces of marihuana to William R. Hicks, which was not in pursuance of a written order of the said William R. Hicks on a form issued in blank for that purpose by the Secretary of the Treasury; in the second count, at the same time and place as described in the first count, he was charged with having acquired two ounces of marihuana without having paid the transfer tax imposed thereon by law, and when he was the transferee required by law to pay the same. After a plea of not guilty to both counts, a trial on the merits, and a verdict of guilty on both counts, the court sentenced the appellant to serve three years imprisonment, and to pay a fine of $100, under each count. Identical separate sentences to run concurrently were entered accordingly.

In response to a question by the court, the defendant's attorney told the court that there was no exception to its charge. The appellant did not file a motion to dismiss or ask for a bill of particulars

prior to the trial; after verdict he filed a motion in arrest of judgment. Therefore, we conclude that the offenses charged in this indictment were sufficiently described to enable the appellant to prepare his defense on the trial below, and to plead former jeopardy successfully if brought to trial again for the same offenses. This is all that is required by the provision of the Sixth Amendment to the effect that the accused shall enjoy the right to be informed of the nature and cause of the accusation against him. *U. S. v. Williams*, 202 F. (2) 712, rehearing denied, 203 F. (2) 572, at page 573, wherein this court said: "An indictment may be defective without being void. Defenses based on defects in the indictment other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. Failure to present timely any such defense or objection constitutes a waiver thereof." See also *Sutton v. U. S.*, 157 F. (2) 661.

We have read the entire record in this case, and think the appellant had a fair trial before an impartial judge and jury; that the jury was warranted in finding from the evidence that the appellant himself transferred two ounces of marihuana to William R. Hicks at the time, place, and in the circumstances, alleged in count one; that he was not acting as a purchasing agent for any one but was a principal in the sale and transfer of the marihuana, regardless of any unknown partner in crime that he may have had. This case on its facts is distinguishable from *Adams v. U. S.*, 220 F. (2) 297.

As to the second count, we are not convinced that the circumstantial evidence was sufficient to war-

rant an inference of guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, which we are holding was true with reference to the first count.

Accordingly, as to the first count, the judgment appealed from is affirmed; as to the second count, the judgment appealed from is reversed, the verdict set aside, and a judgment of acquittal entered for appellant.

AFFIRMED in part and REVERSED in part.

A True Copy:
Teste:
(Seal)

JOHN A. FEEHAN, JR.
Clerk of the United States Court
of Appeals for the Fifth Circuit.

Exhibit "C"

The following testimony supports the defense of entrapment.

The governments witness, *George Williamson*, an undercover agent for the "narcotics people" (R., p. 14-15), testified that he knew defendant, Robert Vasquez, and identified him; and he, Williamson, had had occasion to see defendant on or about April 9, 1954. (R. 12-13.)

He saw him in Austin, in Travis County, Texas, on that night. Williamson called the defendant and told him that he, Williamson, had a friend he wanted the defendant to meet, and that he wanted defendant to come up to Williamson's apartment and meet the friend. Defendant came and Williamson introduced him to the friend, Bob. Bob in reality was Bob Hicks, Williamson testified; "we talked awhile and Vasquez said he could supply marihuana to myself or any friends of mine, and for resale to the University or wherever, to peddle it. And then I introduced him to Hicks and we talked about a buy later that night, and he was supposed to come back later with some marihuana, and I talked to him several times over the phone after that." (R. 14.)

Williamson testified that Vasquez came back later that night and gave the money back to Hicks that he had taken earlier the night before. (R. 14.)

Williamson first met Hicks sometime during February at the sheriff, Mr. Lang's office, with a Mr. Brownley, (head of the narcotics division, R., p. 77), where he agreed to work as a special undercover agent. (R. 15.)

On April 29, 1954, Williamson testified that he called the defendant; he testified, defendant had been asking when Bob was going to be back in town. Williamson testified Bob was supposed to be an air force man at Bergstrom. That night when Williamson called defendant, he told defendant Bob was back in town and handed the phone to Bob, and Bob talked to defendant from then. According to Williamson, defendant was supposed to come to Williamson's place and honk the horn. Around about 9:15 or 9:30 Williamson heard a horn honk, and Hicks went outside. Williamson went to the door and saw Hicks and defendant talking, and Williamson testified he saw something change hands, "what appeared to be money." Williamson testified that he could not say definitely what it was, because it was night. (R. 16.)

On cross examination Williamson testified that on April 9, 1954, when defendant first met Hicks that defendant said he could get marihuana, for Williamson and Hicks just to give him the forty dollars, and *he (defendant) would find the contact and buy the marihuana and bring it back for them.* (R. 31; Italics ours.)

Defendant did not get the marihuana that night; and Williamson testified that never in his life had he seen the defendant in possession of any marihuana. (R. 31.)

Mr. William R. Hicks, a witness for the government, testified that he was a federal narcotics agent, working undercover, under the name of Bob Harrison. (R. 45-46.) He testified he had occasion to see the defendant April 9, 1954. He testified he, Hicks,

was introduced to defendant by George Williamson, after defendant came to Williamson's apartment. Shortly after the introduction, Hicks testified, the conversation began regarding marihuana. Hicks testified, "Williamson and I stated we would like to buy a little marihuana that night for, as we (sic) stated, a party." (R. 46.)

Hicks testified that he, Hicks, gave defendant forty dollars, and defendant left the apartment, stating that he, defendant, "would either come back or call us and tell us where to pick up the marihuana." Hicks testified defendant came back a few hours later and returned the money, and did not deliver the marihuana. (R. 47.)

Hicks testified that he, Hicks, saw defendant again on April 29, 1954. That night about 8:45, Hicks testified he went to Williamson's apartment. Hicks testified that Williamson made a phone call and asked for defendant and spoke on the phone a few minutes, and then Williamson gave the phone to Hicks. Hicks testified that he then talked to Robert Vasquez, this defendant, and that defendant stated he could supply marihuana that night, and that it would not be in cigarette form, but it would be loose marihuana, in bulk. (R. 47.)

Hicks testified that defendant said that he, defendant, would come by the apartment and honk, and for Hicks to come out to his, defendant's car. Hicks testified that about 8:15 he, Hicks, heard a honk, and walked outside and saw defendant, standing in the yard about ten or fifteen feet from the curb. Hicks testified that defendant immedately stated: *"Give*

me the money and I will tell you where to pick up the stuff." (R. 49, Italics ours.)

Hicks testified that he, Hicks, objected to paying defendant the money without seeing it ("the stuff"), but defendant said he was taking a big risk, and he, defendant, wanted to do it his way. Hicks testified that he gave the defendant forty dollars, *funds advanced to him, Hicks, by the government for that purpose,* (Italics ours), and then defendant left. Hicks testified that defendant "told me that—he told me to look under the left front seat of Buddy's car, that the marihuana was there." Hicks testified defendant left in a Chevrolet that was parked in front of the house, and that he, Hicks, went to Williamson's car and found a small sack under the left front seat of the car. (R. 48.)

Mr. Hicks did not testify what was in the sack, nor did he identify the sack found in Williamson's car as being the government's Exhibit No. 1 or No. 2, which bore his initial. (R. 48-49.) There is no other evidence in the record which establishes, or attempts to establish that the sack found by Hicks in Williamson's car as containing marihuana.

Defendant testified that on April 29, 1954, Williamson called defendant and talked to him and told defendant to come on down, that Harrison was in town, and not to disappoint him. On the previous day defendant testified, he talked with Williamson, and Williamson said Harrison would be in town, and defendant was to come over and give him the information and receive the forty dollars. Defendant was to get the forty dollars from Harrison and give it to Williamson the next day. Defendant after he got the

forty dollars from Hicks on April 29, 1954, gave the money to Williamson a few days later, and Williamson gave defendant ten dollars for his trouble. (R. 71-77.)

Mr. Williamson did not return to the stand and deny defendant's testimony that he, Williamson, had called defendant and told defendant to tell Harrison the stuff was in his, Williamson's car and to pick up forty dollars; nor did Williamson deny that defendant returned the forty dollars to him, Williamson.

The following specifications and propositions were presented at p. 62, of Appellant's Brief in the Court below:

"V.

"1.

"Under the Seventh and Tenth Specifications of Error to the effect that the charge of the court on entrapment was fundamentally erroneous and that the evidence established the defense of entrapment as a matter of law.

"2.

"PROPOSITIONS UNDER FOREGOING ASSIGNMENTS OF ERROR

"Ninth Proposition Under Tenth Specification of Error

"In this case the defense of entrapment is not limited to acts of fraud and trickery, and the court

should not have instructed the jury that there can be entrapment only in those cases where 'before the commission of the acts alleged to constitute the crime the defendant had never conceived any intention of committing these offenses or similar offenses'.

"Tenth Proposition Under
Tenth Specification of Error

"An erroneous charge clearly misstating the law of entrapment may be acted upon in the Court of Appeal, even though not objected to below."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 835

ROBERT VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B 23–25; R. 163–165) is reported at 229 F. 2d 288.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1956 (R. 166). A petition for rehearing (R. 167–170) was denied on March 13, 1956 (R. 178) and the petition for a writ of certiorari was filed on April 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether failure to allege *scienter* in an indictment charging transfer of marihuana is a defect cognizable under a motion in arrest of judgment where *scienter* had been proved in the trial.

2. Whether the trial court's charge on entrapment to which petitioner did not object constituted plain error under Rule 52 (b), F. R. Crim. P.

3. Whether the jury's finding petitioner guilty as both a transferor and transferee of marihuana (the transferee count having been reversed on appeal) renders the verdict fatally inconsistent.

STATUTES AND RULES INVOLVED

26 U. S. C. 2591 (a):

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

26 U. S. C. 2593 (a):

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any

> marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).[1]

Rule 12 (b) (2), F. R. Crim. P. provides:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Rule 30, F. R. Crim. P. provides in pertinent part:

> * * * No party may assign as error any portion of the charge or omission there-

[1] 26 U. S. C. 2601 made applicable to marihuana the penalty provisions relating to narcotics and Section 2557 (b) provided a penalty of a fine of not more than $2,000 and imprisonment for not less than two nor more than five years for a first offense.

> from unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Rule 52 (b), F. R. Crim. P. provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

In the United States District Court for the Western District of Texas petitioner was convicted by a jury (R. 136) on both counts of an indictment (R. 3) charging illegal acquisition and transfer of marihuana on or about April 29, 1954. The indictment charged in count one that petitioner transferred two ounces of marihuana not in pursuance of a written order on a form issued in blank for that purpose by the Secretary of the Treasury, without alleging that the act was wilfully and knowingly done. He was sentenced to pay a fine of one hundred dollars and to serve three years imprisonment on each count, the sentences to run concurrently (R. 19). The Court of Appeals unanimously affirmed the conviction on the first count and reversed on the second count (charging acquisition of marihuana) for insufficiency of the evidence (Pet. 24, 25; R. 163–165).

The facts pertinent to the issues raised by the petition for a writ of certiorari may be summarized as follows:

One Williamson, a student at the University of Texas (R. 53), testified that petitioner had repeatedly, over a period of several weeks, suggested that Texas University would be an ideal place to peddle narcotics and marihuana among the students and that he, petitioner, could furnish the "stuff" (R. 14, 29). Williamson contacted narcotics agents and began work as an undercover agent (R. 14, 15). On April 9, 1954, Williamson called petitioner asking that he come to Williamson's apartment to meet a friend (R. 13). At the apartment, Williamson introduced petitioner to William Hicks, a narcotics agent, who was using the name of Harrison (R. 13) and posing as an airman at Bergstrom Field (R. 15, 30, 46, 47). Petitioner stated that he could supply marihuana and it was arranged that he was to bring some to the apartment that night (R. 14, 47). After a series of phone calls he returned to the apartment and refunded the money saying that he had been unsucessful because his source of supply was so "high" that he was unable to find his cache on the San Antonio highway (R. 14, 32, 47).

Williamson saw petitioner daily during the next three weeks and petitioner inquired when "Bob" would be back in town (R. 15). On April 29th, Williamson called petitioner and told him that Bob was back and in quest of a supply of "stuff". Hicks spoke to petitioner and arranged a delivery at Williamson's apartment (R. 15, 47–

48). When Hicks met petitioner in the front yard, petitioner demanded the money first. Hicks paid him forty dollars, and found the marihuana as petitioner had promised under the front seat of Williamson's car (R. 48). Hicks made demand on petitioner in the county jail to produce a written order form issued by the Secretary of the Treasury covering transfer of marihuana, and petitioner failed to produce such form (R. 49).

Petitioner testified that Harrison, Hicks, and Williamson on the first occasion gave him forty dollars to see whether he could find any marihuana for them over petitioner's protests that he did not know of any; that he did not know anything about marihuana, but decided to take the money as he was short of cash; that on demand he returned the forty dollars (R. 69, 70). He also testified that on the second occasion Williamson told him to give Bob Harrison the information that the marihuana was in Williamson's car, to collect forty dollars from Harrison and bring the money to Williamson; and that he did this (R. 71, 72, 73). Petitioner testified that he told the narcotics agents on his arrest that he was not guilty of the sales but that he did not tell them about Williamson's involvement (R. 80).

Hicks was recalled and testified that petitioner, after being warned of his rights, admitted on the night of his arrest to Hicks and two other agents, who were present, that he made the sale with

which he was charged (R. 111, 112). The prosecution stated that they had the two other agents available and that they would not be called as their testimony on this point would be merely cumulative of Hicks' (R. 114).

With respect to entrapment the court charged the jury as follows (R. 117, 118):

> If you are satisfied that prior to the commission of the acts alleged to constitute the crime, that the defendant never conceived any intention of committing these offenses or similar offenses, but that the officers of the Government incited and by persuasion and representations lured him to commit the offense alleged in order to entrap, arrest and prosecute him therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of not guilty.
>
> When it is suspected that a crime is being committed and the question is as to who the guilty persons are, traps may be laid and baited in order to catch the guilty person. A suspected person may be tested by being offered opportunity to transgress in such manner as is usual therein. The question is not one of laying a trap or of trickiness or deceit which is permissible in order to detect a person in the commission of crime, but is one of seduction or improper inducement to commit the crime. In other words, the officers or informers may give the defendant an opportunity to violate the law, but they cannot by persuasion or inducement cause him to commit a

> crime which he would not otherwise have committed and thereafter successfully prosecute him.

Petitioner took no exception to the charge (R. 123).

ARGUMENT

1. Petitioner raised no objection to the indictment until his motion in arrest of judgment when he asserted for the first time that it was fatally defective for failure to allege willfulness (R. 141–146). The district court overruled the motion (R. 147). The Court of Appeals held that the offenses charged in the indictment were sufficiently described to enable the appellant to prepare his defense on the trial below, and to plead former jeopardy successfully if brought to trial for the same offenses (Pet. 24). The Court of Appeals did not hold, as petitioner contends (Pet. 8–12), that an indictment failing to state an offense may not be attacked after trial, but held merely that "Defenses based on defects in the indictment other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial."

In any event, there is no substance in petitioner's point since it is settled that *scienter* need not be alleged in an indictment charging sale of narcotics. As this Court said in *United States* v. *Balint*, 258 U. S. 250, 254, the manifest purpose of federal narcotics legislation is "to require every person dealing in drugs to ascertain at his

peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him". This Court reaffirmed the *Balint* doctrine when it discussed at length the necessity of allegations of *scienter* in *Morissette* v. *United States,* 342 U. S. 246, at 250–263.

It is noteworthy that the proof clearly established petitioner's *scienter.* His argument (Pet. 11) that *Balint* could not apply to "a person not trafficking in marihuana, who merely transfers a substance, in fact marihuana [not knowing] what the substance was" bears no relation to the picture drawn by the evidence of the prosecution. It is apparently related to the plainly weak story he told on the stand, which the jury understandably refused to believe.

2. Although he took no exception to the charge on entrapment in the trial court, petitioner now contends that there was such substantial error that the Court of Appeals should have noticed it under Rule 52 (b), F. R. Crim. P. A reading of the charge on this issue, quoted at pages 7–8 *supra,* refutes this contention. The charge was a fair one and in accord with the principles established by this Court in *Sorrells* v. *United States,* 287 U. S. 435, 441–442.

The charge given was not, as petitioner argues, the same as that given in *United States* v. *Sherman,* 200 F. 2d 880 (C. A. 2); the trial court here did not make the defense of entrapment turn on

trickery and deceit and not inducement. A cursory comparison of the instructions in the two cases reveals the radical difference; but it may be noted, by way of example, that in this case the lower court charged (R. 118) "The question is not one of laying a trap or of trickiness or deceit which is permissible in order to detect a person in the commission of crime, but is one of seduction or improper inducement to commit the crime".

3. There is no merit in petitioner's contention that he could not be convicted of being both a transferor and a transferee of the same marihauana at the time and place specified in the indictment. The place specified in the indictment was merely Travis County and the time was the entire day, April 29th. No contention was made by the government that petitioner's transaction with Hicks constituted both a sale and a purchase by petitioner as he seems to maintain. One can, of course, buy marihuana and then resell it. And, while the Court of Appeals found the evidence insufficient[2] to show that petitioner ac-

[2] The proof of the acquisition was slight, consisting of proof that petitioner's previous method of operation was to go and obtain a drug on the same day as he made his sale, and that petitioner was unable on demand to produce an order form required for passing marihuana (R. 49). Such forms are required to be kept by the acquirer of marihuana, as well as the seller, and lack of the same is presumptive evidence of violation of 26 U. S. C. 2593 (a). Thus, petitioner should have had in his possession both an original order form covering the sale by him to Hicks and a copy of another

quired the marihuana illegally, the verdict was not for that reason inconsistent.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

MAY 1956.

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order form covering the acquisition of the marihuana by petitioner. No evidence was introduced of his possession of any order forms.

U. S. GOVERNMENT PRINTING OFFICE: 1956